FILED
FEB 1 1988

No. 87-1245

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TEXAS MONTHLY, INC.,
Appellant,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, JIM MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS, AND ANN RICHARDS, TREASURER OF THE STATE OF TEXAS,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE MAGAZINE PUBLISHERS OF AMERICA, INC., *AMICUS CURIAE*

ELI D. MINTON
JAMES R. CREGAN
1211 Connecticut Avenue
Washington, D.C. 20036
(202) 861-0420

Counsel for *Amicus Curiae*

February 25, 1988

CASELAW PRESS INC. — 1717 K ST NW WASH DC 20036 — 223-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1245

TEXAS MONTHLY, INC.,

Appellant,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, JIM MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS, AND ANN RICHARDS, TREASURER OF THE STATE OF TEXAS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE MAGAZINE PUBLISHERS OF AMERICA, INC., *AMICUS CURIAE*

Movant is a national trade association of magazine publishers who publish more than 900 magazines. The written consent of the appellant, Texas Monthly, Inc., has been obtained and filed with the clerk of this Court. The consent of the appellee has been requested and refused.

Movant seeks to submit a brief *amicus curiae* because it shares with appellant a vital interest in the outcome of this proceeding. The imposition of the Texas sales tax on appellant's and most other publications, but not on certain religious publications, impermissibly abridges appellant's rights and involves the state in the advancement of a religious faith in violation of the First and Fourteenth Amendments to the Constitution of the United States.

Movant requests this Court to grant leave to file its accompanying brief *amicus curiae* to present its views to this Court urging reversal of the opinion of the court below.

/s/

Eli D. Minton
James R. Cregan
1211 Connecticut Avenue
Washington, D.C. 20036
(202) 861-0420

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 6

TABLE OF AUTHORITIES

Cases: Page

Arkansas Writer's Project v. Ragland,
481 U.S. ____; 95 L.Ed.2d 209 (1987) 2, 3, 4, 5

Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue,
460 U.S. 575 (1983) 4

Carmichael v. Southern Coke and Co.,
301 U.S. 495 (1936) 5

Madden v. Kentucky,
309 U.S. 83 (1940) 5

Lemon v. Kurtzman,
403 U.S. 602 (1971) 5, 6

Texas Monthly, Inc. v. Bullock, et al.,
731 S.W. 2d 160 (1987) 3

Statutes:

Texas Tax Code, § 151.312 ..... 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1245

TEXAS MONTHLY, INC.,

Appellant,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, JIM MATTOX, ATTORNEY GENERAL OF THE STATE OF TEXAS, AND ANN RICHARDS, TREASURER OF THE STATE OF TEXAS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

BRIEF OF THE MAGAZINE PUBLISHERS OF AMERICA, INC., *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

The Magazine Publishers of America, Inc. (MPA), is a national trade association including in its membership more than 200 magazine publishers who publish about 900 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly,

biweekly and monthly publications covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations, and pastimes of the American people.

MPA shares with Texas Monthly, Inc., and others a commitment to exercise and preserve First Amendment liberties protected by the Constitution and this Court, as well as a common conviction that the decision of the Texas Court of Appeals upholding the constitutionality of the sales tax as it applies to most publications but not to religious publications abridges the Freedoms of Speech and of the Press of all but the exempt, and advances the cause of a religious faith in violation of the establishment clause of the First Amendment.

SUMMARY OF ARGUMENT

In upholding the constitutionality of the Texas retail sales tax, which applied to the sale of all publications except publications consisting wholly of religious writing published or distributed by a religious faith, the Texas Court of Appeals misread this Court's decision in *Arkansas Writer's Project v. Ragland*, 481 U.S. ____; 95 L.Ed. 2d 209 (1987). The Texas Court interpreted *Arkansas Writer's Project* to apply only to cases where the press is singled out for taxation or where a small number of publications are subject to taxation. That narrow view ignores this Court's principal reason for striking down the Arkansas tax: the Arkansas tax discriminated on the basis of the content of the publication. The Texas statute is identical to the Arkansas statute in that it exempts a class of publications from taxation *based on the content of the publication.* The Texas court also erred in finding a secular purpose in the exemption of religious publications. A secular purpose cannot be present when the *only*

purpose of legislation is to exempt religious publications from taxation, thereby violating the establishment clause of the First Amendment and impermissibly involving the state in the advancement of a religious faith.

ARGUMENT

Following a trial in February, 1986, the District Court of Travis County, Texas, held that section 151.312 of the Texas Tax Code, exempting certain religious publications from the payment of sales taxes, "constitutes an unlawful discrimination based on the content of [Texas Monthly's] publication in violation of its rights under the First and Fourteenth Amendments" of the Constitution of the United States. On appeal, the Texas Court of Appeals reversed, holding that the statute did not discriminate in violation of the plaintiff's right of free speech, but merely served to protect the church and church publications from governmental interference. After this Court issued its opinion in *Arkansas Writer's Project v. Ragland*, decided April 22, 1987, the Texas court withdrew its initial opinion and issued a second opinion. Addressing Appellant's argument that this Court's decision in *Arkansas Writer's Project* applied to the case before the court, the court said:

> The Supreme Court determined that the tax exemption in *Ragland* was so broad that it had the effect of singling out a very small group of magazines for *taxation*. This appeal, to the contrary, presents the opposite situation. The great mass of publishers remain subject to the sales tax. The Legislature has rationally determined to *exempt* religious publications as a means of furthering the separation of church and state. Neither of the situations deemed objectionable by the Supreme Court in *Ragland* is presented in this appeal. 731 S.W.2d 160, 165.

We respectfully suggest that the Texas court stopped reading too soon. After making the point that the Arkansas tax applied to "only a few" magazines (which the Texas court found to be decisive), this Court went beyond its earlier decision in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983):

> Indeed, this case involves a more disturbing use of selective taxation than Minneapolis Star because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." [Citations omitted] 481 U.S. ____; 95 L.Ed.2d 220.

The method selected by the Texas legislature to tax publications is content-based, the approach struck down by this Court in *Arkansas Writer's Project*. The Texas legislature exempted only periodicals "published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith. . . ." Texas Tax Code, §151.312. A more conspicuous example of content-based discrimination is hard to imagine. It is precisely the kind of tax discrimination found unconstitutional in *Arkansas Writer's Project*.

In examining whether Arkansas's exemption of religious and other publications from the sales tax was justified, this Court laid down a difficult course:

> Arkansas faces a heavy burden in attempting to defend its content-based approach to taxation of magazines. In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and

> is narrowly drawn to achieve that end.
> [Citation omitted] 481 U.S. ____; 95 L.Ed.2d 221.

The Texas court imposed no such burden. Instead, relying on *Carmichael v. Southern Coke and Co.*, 301 U.S. 495 (1936) and *Madden v. Kentucky*, 309 U.S. 83 (1940), the Texas court applied the far less stringent "rational legislative purpose," standard for testing the validity of the tax exemption, and imposed upon the appellant the burden "to negate every conceivable basis which might support" the tax discrimination. Obviously, as this Court made clear in *Minneapolis Star* and *Arkansas Writer's Project*, where First Amendment issues are involved, a much higher standard is necessary to sustain government infringement and the burden to justify the infringement rests upon the state. The court below did not apply those mandates.

Responding to appellant's argument that the exemption constitutes a law "respecting an establishment of religion" in violation of the First Amendment, the Texas court compared the exemption to the three-part test prescribed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster "an excessive entanglement with religion." 403 U.S. 612-613

The Texas court found that the exemption has a "secular legislative purpose", that purpose being to ensure the neutrality of state action. We disagree; a statute that grants a tax exemption *only* to religious publications has *no* secular purpose. Neutrality is achieved not by granting preferences, but by treating all alike. The primary effect of exemption from taxation is to relieve the beneficiary from the burden of pay-

ing taxes, and when the only beneficiaries are the publishers of publications promulgating a religious faith, the inevitable effect of the exemption is to advance the cause of the religion espoused. Notwithstanding the protestations of the Comptroller's witness, the Comptroller *must* become "entangled". A religious faith is a "belief" not an enterprise. Merely to determine whether a corporation, association, or trio is a "religious faith" as the legislature envisioned involves analysis and judgment. Unless the Comptroller abandons his constitutional responsibility to the people of Texas to administer, faithfully, the Texas Tax Code, he must determine whether a particular organization is a "religious faith" and whether particular writings promulgate "the teaching of the faith." Should he magically achieve this elusive goal without becoming entangled in the nuances of "faith" and "promulgation," the Texas exemption still fails two of the three *Lemon* tests: the exemption serves no purpose except to exempt religious publications from taxation, and that exemption necessarily advances the advocacy of a religion.

CONCLUSION

We respectfully urge this Court to reverse the decision of the Texas Court of Appeals and return the case for the lower court to order appellees to refund the taxes paid under protest.

Respectfully submitted,

ELI D. MINTON
JAMES R. CREGAN
1211 Connecticut Avenue
Washington, D.C. 20036
(202) 861-0420

Counsel for *Amicus Curiae*

February 25, 1988